87-641

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ERWIN N. SOBCZYK,

Petitioner,

vs.

THE AETNA CASUALTY AND SURETY COMPANY and MILWAUKEE TEACHERS EDUCATION ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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QUESTION PRESENTED FOR REVIEW

Does federal law preclude a negligence action against a public employee's union by a member of the public injured as a direct and proximate result of an illegal strike?

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ERWIN N. SOBCZYK,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

LOWER COURT DECISIONS

On November 20, 1985 a Milwaukee County jury of twelve found the union known as the Milwaukee Teachers Education Association liable for injuries sustained by Erwin N. Sobczyk during an illegal strike (App. B. at 1). In motions after verdict, the trial court found that federal law precluded liability. The Wisconsin Court of Appeals initially overruled the trial court, however, upon reconsideration held that as a matter of law the union could not be held liable for Erwin N. Sobczyk's injuries (App. C. at 16). This opinion has not been published to date. Thereafter on August 18, 1987 the Wisconsin Supreme Court declined to review the court of appeals' determination.

STATEMENT OF GROUNDS FOR JURISDICTION

This is an appeal from a final judgment of the Wisconsin Supreme Court entered on August 18, 1987. This Court's jurisdiction is conferred by 28 U.S.C. Sec. 1257(3).

STATEMENT OF THE CASE

On June 5, 1980 the petitioner, Erwin N. Sobczyk ("Sobczyk") (then 57), was a janitor-boiler attendant at Pulaski High School in Milwaukee, Wisconsin. On that day, the students were preparing for their summer vacation. The students by contract were under the collective supervision of the teachers, who were all members of or represented by a union known as the Milwaukee Teachers Education Association ("MTEA"). One of the school activities prior to the June 7, 1980 beginning of summer vacation was the annual student "locker cleanup" which was scheduled for an extended homeroom period (Tr. Vol. I, p. 52). Each student was to clean out his locker of the year's accumulation of books, papers and other debris. In preparation for this cleanup, Sobczyk and other members of the maintenance staff lined the hallways with garbage containers. At approximately 8:10 a.m. that morning, directly after an extended "homeroom" cleanup, a dismissal bell rang and the students proceeded to their first class of the day. When the students arrived at their first-period classroom, they discovered that the MTEA union mem-

bers had initiated a wildcat strike.[1] It is uncontroverted that neither the superintendent of the Milwaukee Public Schools, the Milwaukee Police Department (Tr. Vol. I, pp. 190, 191) nor members of the public (Sobczyk) had been given any warning of the union's pending strike. The union members had locked their classroom doors, leaving the students stranded in the hallways, and the members en masse proceeded to the school library where they locked themselves in.

In the following 15 to 30 minutes, the 2,000 unsupervised students proceeded from the childish horseplay, such as kicking over garbage containers, to a series of major and minor fights, vandalism and even arson to the school itself.

During the student riot, while Sobczyk was attempting to gather the discarded debris, an unknown person, presumably one of the unsupervised students, picked up a metal trash container filled with debris (estimated weight 50-75 lbs.) and threw it at Sobczyk from behind. This garbage container struck Sobczyk in the right side of the right knee. It was later learned that this blow caused a permanent injury known as a tear of the medial meniscus (a cartilage of the knee). This injury, together with the Milwaukee School Board's policy of no light duty, forced Sobczyk into an early retirement. Due to his age and injury, he has been unable to find employment since the occurrence.

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[1] This "strike" had its genesis in a dispute over the suspension of a student who had returned to school over the objections of the teaching staff (Dr. Lee McMurrin, Tr. Vol. II) (Mr. Robert Buege, Tr. Vol. II).

On March 10, 1982 Sobczyk commenced the present negligence action against the defendant union, the MTEA. Thereafter the complaint was amended to add the Aetna Casualty and Surety Company ("Aetna"), the insurer of the MTEA.

On August 16, 1982 the defendants brought on for hearing a motion for summary judgment, alleging that by virtue of the "little Norris-LaGuardia Act"[2], Wis. Stats., Sec. 103.54[3], it was immune from suit. The plaintiff in response argued that Sec. 103.54 did not immunize the defendants from suit, but rather created a burden of proof which a plaintiff must meet to sustain liability. The Cir-

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[2] Sec. 103.54 provides:

> 103.54 Responsibility for unlawful acts. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute (as these terms are defined in s. 103.62) shall be held responsible or liable in any civil action at law or suit in equity, or in any criminal prosecution, for the unlawful acts of individual officers, members, or agents, except upon proof by a preponderance of the evidence and without the aid of any presumptions of law or fact, both of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and (b) actual participation in or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization.

[3] This section of the Norris-LaGuardia Act was adopted by the Wisconsin Legislature in 1932 from 29 U.S.C. 106 which provides:

> s. 106. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents.
>
> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

cuit Court of Milwaukee County, Wisconsin, requested briefs upon the interpretation of Sec. 103.54 and then issued a lengthy written opinion denying summary judgment (R. 33-16, App. A at 1, 15). In that decision, under United States Supreme Court precedents, the trial court found, *inter alia*, that:

1. A union, its officers and members, can be sued for negligence under Sec. 103.54;

2. Under federal case law a union cannot distinguish actions taken by its rank and file from that of union leadership for as a general proposition a functioning union must be held responsible for the mass actions of its members (App. p. 107);

3. A union has a duty to supervise and control its members (App. pp. 109, 110); and

4. There existed as questions of fact for the jury whether or not the union "authorized", "participated in" or "ratified" its members' acts of June 5, 1980 (App. p. 114).

On September 23, 1983 the defendants brought on a motion to reconsider the decision denying the defendants' summary judgment (R. 39-3, 38-2, 40-3). On November 7, 1983 the circuit court again denied the motion for summary judgment, again finding that there were material questions of fact to be determined by the jury. The matter was tried to a jury of twelve from November 11, 1985 to November 20, 1985.

In the jury trial further evidence was adduced which showed that:

1. The rank and file MTEA members at Pulaski High School were upset due to an assault upon a fellow union member.

2. The student who committed the assault was scheduled for a hearing before the school board wherein the sanction could have been potential expulsion (Wis. Stats., Sec. 120.13(1)).

3. Due to a lack of a quorum of school board members, the student could not be expelled under state law (Testimony of school superintendent, Dr. Lee McMurrin).

4. The school superintendent informed the people at the meeting that the administration also sought to expel the student, however, because of a lack of a quorum and due to the express provisions of state law, he was constrained the allow the student to return to school.

5. The assistant executives[4] on the MTEA union staff knew the night before the strike that a strike was planned and failed to tell the authorities.

6. On the evening of June 4, 1980, various union members and officers discussed over the telephone the proposed labor action.

7. On the morning of June 5, 1980, the union Building Committee, chaired by the MTEA Building Representative, Mr. Robert Buege, called the strike. As the MTEA Building Representative, he was charged with handling all local union problems and grievances with the local administration.

8. The strike meeting occurred on June 5, 1980 just prior to the beginning of the school day. In attendance at the meeting were eight to ten union members and they discussed a "walkout".

[4] The union members and the executive director of the union testified that he and his staff were not members of the union and were only the union's paid employees.

9. By contract the Milwaukee School Board was required by the MTEA to recognize the MTEA representatives and the MTEA Building Committee as the union's official representatives at each school.

10. The building representatives and committeemen were elected by the union members as their union representatives. These individuals hold a position in the union as constitutional officers.

At the close of evidence, the court denied all motions challenging the sufficiency of the evidence and in addition ruled as a matter of law that Sobczyk was not contributorily negligent. The court also ordered that the jury be submitted a special verdict with an ultimate fact question regarding Sec. 103.54 (Tr. Vol. V, pp. 924, 925). The jury deliberated and returned a verdict finding the MTEA negligent and assessed total special damages in the amount of $122,821.64 (App. B at 1, 2).

On motions after verdict, the trial court held that although the strike was illegal under state law (Wis. Stats., Sec. 111.70(4)(13)(L)[5] and further, that the teacher members of the union were negligent in failing to supervise the 2,000 students, that absent a formal strike vote "authorizing" union action, the strike by the entire staff at

[5] Wis. Stats., Sec. 111.70(4)(13)(L) states:

(L) Strikes prohibited: exception. Except as authorized under par. (cm) 5 and 6.c. nothing contained in this subchapter constitutes a grant of the right to strike by any municipal employe, and such *strikes are hereby expressly prohibited.* (Emphasis supplied).

Sec. 111.70(1)(nm) defines a strike as:

(nm) "Strike" includes any strike or other concerted stoppage of work by municipal employes, and any concerted slowdown or other concerted interruption of operations or services by municipal employes, or any concerted refusal to work or perform their usual duties as municipal employes, for the purpose of enforcing demands upon a municipal employer.

Pulaski High School was not "participation" under federal law. It then granted the defendants' judgment notwithstanding the verdict. Stated in another fashion, the trial court held that prior to a finding of union culpability for damages there must be "authorization" *and* "participation" before liability accrues, whereas Sec. 103.54 and 29 U.S.C. 106 both state that upon a finding of either "participation . . ., *or* . . . authorization" liability accrues[6].

The appellant Sobczyk timely appealed and moved the Wisconsin Court of Appeals for summary disposition of the appeal. The court of appeals, on August 18, 1986, based upon Wisconsin procedural law, reversed the trial court and directed entry of judgment upon the verdict in favor of the plaintiff (App. C at 1, 4). Thereafter, defendant-respondent moved the court of appeals to reconsider upon its own motion, which the Wisconsin Court of Appeals did by order of September 2, 1986. On June 12, 1987 the court of appeals ruled that notwithstanding the trial court's procedural errors, it found further fault with the trial court's failure to hold a second summary judgment motion and held that if that motion had been heard, the trial court would have granted the defendant's motion for reconsideration of summary judgment. The court of appeals specifically held that Wis. Stats., Sec. 103.54, was in *pari materia* with 29 U.S.C. 106 and that under federal case law the union could not be held liable for damages resulting from the illegal strike (App. C at 5, 16). A petition for review was filed with the Wisconsin Supreme Court which on August 18, 1987 refused to review the decision (App. D at 1). The resulting precedent is that a member of the public cannot hold a union culpable for damages sustained directly caused by an illegal strike.

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[6] The Wisconsin Court of Appeals never addressed this question in its written decision (App. C at 5, 16).

ARGUMENT

I.

A PUBLIC EMPLOYEES' UNION SHOULD BE HELD LIABLE TO A MEMBER OF THE PUBLIC INJURED AS A DIRECT AND PROXIMATE RESULT OF AN ILLEGAL STRIKE.

A. Labor Law Anti-Injunction Statutes Do Not Apply To Third Party Negligence Suits.

The case at bar presents a novel question of law never resolved by any court in the union. It was presented to the Wisconsin courts in a vacuum of law, inasmuch as Wis. Stats., Sec. 103.54 and the Norris-LaGuardia Act upon which that state statute is based have never been used in application to a third party's negligence suit against a union. Theoretically, as both the trial court and the appellate court found, Sec. 103.54 and 29 U.S.C. 106 applied to the cause of action because a public employee's strike in Wisconsin is an "illegal" act and negligence is an "unlawful" act. Legislative history of both statutes indicate that these anti-injunctive statutes were not drafted to apply to third parties' common law actions for damages but were codified to govern the issuance of injunctions during labor disputes[7] between employee and employer.

> The relationship of employer and employee must exist or dispute must grow out of that relationship before the Labor Disputes Act has application. *New Negro Alliance v. Sanity Grocery Co.*, 303 U.S. 552, 553 (1938). *See*: 29 U.S.C. Service sec. 113, sec. 12 Absence of Labor Dispute.

[7] The definition of a labor dispute (Wis. Stats., Sec. 103.62) is in *pari materia* with the federal definition of a labor dispute. 29 U.S.C. Sec. 113.

See, United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395 (1947).

One of the principal errors made by the Wisconsin Court of Appeals is that it used Taft-Hartley cases in determining liability under Sec. 103.54. As this Court is aware, liability under the Norris-LaGuardia Act of 1932, 29 U.S.C. Secs. 101-115, is not governed by case law under the Taft-Hartley Act of 1947 (29 U.S.C. Sec. 141, et seq.). This Court should note that Wisconsin law codified a portion of the Norris-LaGuardia Act of 1938 (Sec. 103.54 is in *pari materia* with 29 U.S.C. Sec. 106). Wisconsin has never codified any of the provisions of the Taft-Hartley Act, 29 U.S.C. 141, et seq., of 1947 (sometimes known as the Labor Management Relations Act of 1947)[8].

In the case at bar there exists as an issue upon review, a serious question of the applicability of these anti-injunction statutes to civil damage suits brought by a member of the public injured when a public employee union struck in violation of the state law. It is the appellant's position that in the absence of a relationship of employer and employee, these statutes should not be used to deprive a member of the public of a remedy for the wrong inflicted upon him.

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[8] For example, in a case cited by the court of appeals, *North River Energy Corp. v. United Mine Workers*, 664 F.2d 1184 (11th Cir. 1983), suit was brought under the Labor Management Relations Act of 1947. That employer sought injunctive relief against a management unauthorized strike over a "lunchbox" search notice. Said case makes it patently clear that the Taft-Hartley Act and the Norris-LaGuardia Act have different purposes and tests for liability. The Wisconsin Court of Appeals failed to distinguish between the two statutes.

B. Assuming The Norris-LaGuardia Act Applied To The Case At Bar, The Evidence Supported The Jury's Finding Of Union Culpability.

Authorization

Assuming, *arguendo*, that the labor anti-injunction statutes do apply to common law negligence suits, the evidence presented to the jury satisfied the burden of proof under the Norris-LaGuardia Act. The Wisconsin Court of Appeals analyzed the evidence under all three tests (authorization, participation and ratification). In so doing, the court of appeals disregarded federal precedent regarding a union's liability for the acts of its members:

> A union is responsible for the mass action of a rank and file member as long as it is a functioning entity. *Wagner Electric Corp. v. Local 1104, Int'l Union of Elec., Radio & Machine Workers*, 496 F.2d 954, 956 (8th Cir. 1974); *Vulcan Materials Co. v. United Steelworkers*, 430 F.2d 446, 455, 457 (5th Cir. 1970), *cert. denied*, 401 U.S. 963, 91 S.Ct. 974, 28 L. Ed.2d 247 (1971); *National Labor Relations Board v. United Mine Workers of America, District 31*, 190 F.2d 251, 252 (4th Cir. 1951); *Adley Express Co. v. Highway Truck Drivers Local 107*, 349 F.Supp. 436, 443 (1972); *reaff'd* 365 F.Supp. 769, 771 (E.D.Pa. 1973); *United States v. International Union, United Mine Workers of America*, 77 F.Supp. 563, 566 (D.D.C. 1948), *aff'd* 85 U.S.App. D.C. 149, 177 F.2d 29, *cert. denied*, 338 U.S. 871, 70 S.Ct. 140, 94 F.Ed. 535 (1949). The rationale for the mass action theory has been described as follows . . . .

Danielson v. United States Seafood Workers Smoked Fish & Cannery Union, 405 F.Supp. 306 (1975).

The court held that as to authorization there was no material question of fact because the affidavits provided prior to trial showed that the "building committee had

no authority to call a strike" (Ct. App. Decision, p. 8). It is correct that there is no *actual* authority granted the committee to formally call a strike. Nonetheless, there is no dispute that they in fact did call a strike under union auspices. The test under all case law is not whether the building committee had actual authority to call a strike but rather did they have the apparent authority to do so. In this regard, it should be noted that even under the Taft-Hartley case of *North River, supra*, a case cited by the court of appeals in its decision of June 12, 1987, the court held:

> It is necessary, however, that the acts of a union agent be committed within the scope of his general ***apparent authority*** and on behalf of the union. [citation omitted] Such acts bind the union, regardless of whether they were specifically authorized or ratified. [citations omitted] (Emphasis supplied).

In *United States Steel Corp. v. UMW*, 519 F.2d 1249 (1975), another case noted by the court of appeals, the court held:

> . . . ***Vulcan*** *reaffirmed the principle, that no* ***actual*** *authority of agents is required* for union responsibility as long as they are acting within the scope of their apparent authority. [citations omitted] (Emphasis supplied).

As noted, it is Hornbook law in Wisconsin and elsewhere that questions of apparent authority are always questions of fact[9].

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[9] *See, Scheuer v. Central States Pension Fund*, 358 F.Supp. 1332 (1973) wherein it is stated that issues of apparent authority are to be resolved by a jury; *Larkin v. Johnson*, 67 Wis. 2d 451, 227 N.W.2d 90 (1975) which states that the question of whether the three-prong test of apparent authority has been met is one of fact; and *Harris v. Knutson*, 35 Wis. 2d 567, 151 N.W.2d 654 (1967) which states that ordinarily, facts upon issues of apparent authority should be resolved by a jury.

As to apparent authority, the affidavits showed the man who led the strike held a constitutional office in the union. The contract between the MTEA and the Milwaukee School Board, introduced as Exhibit 1, states:

> The MTEA may in each school have a Building Representative and a School Representative Committee. Principals *shall* recognize such committees and shall meet with such committee. (Emphasis supplied).

Testimony showed that by virtue of this contract, the Milwaukee School Board was required by the MTEA to recognize the Building Representatives as the MTEA representatives and the MTEA Building Committee as the union's *official representatives* at each particular school (Tr. Vol. I, p. 164).

The Building Representatives and union members who in toto composed the Building Committee were elected by the union rank and file in each school (R. 92-1).

Testimony also showed that the Building Committee chairman acted as the union's steward at each school and as such acted in the capacity of the union's liaison with the local administration (Tr. Vol. I, p. 33) (See Ex. 2, Union Contract with the Milwaukee School Board). Mr. Buege, the Building Representative at Pulaski, was the admitted leader of this illegal strike on June 5, 1980 (Tr. Vol. II, p. 347, et seq.).

In addition, most of the MTEA members who testified admitted that the Building Representatives were the union's stewards (Tr. Vol. I. p. 33). For example, Mrs. Elizabeth Bullock (the union member who under the command of the stewards took over the public address system and announced the strike to the MTEA rank and file), testified that she considered the Building Committee to be the union's representatives as Pulaski (Tr. Vol. I. p. 89).

Finally, it should be noted that the officers who called the strike were specifically created and empowered by the MTEA union constitution[10], just as the United States and Wisconsin Constitutions create the offices of secretary of state (Wisconsin Constitution, Art. VI). Clearly, when one considers the facts that a strike occurred, that it was called by a union steward who is by union constitution a union officer with constitutional and contractual authority, the question of apparent authority under Sec. 103.54 is a question of material fact for the jury to consider and decide.

Participation

As to the proofs regarding "participation", it is undisputed that on June 5, 1980 there was a mass action by members and officers of the MTEA at Pulaski High School. The Wisconsin Court of Appeals disregarded this doctrine, stating:

> . . . A union has an identity separate and apart from its members, *Consolidation Coal Co. v. UMW*, 500 F.Supp. 72, 74 (D. Utah 1980), *aff'd*, 725 F.2d 1258 (6th Cir. 1984), and the fact that a strike occurred is not sufficient in itself to raise a presumption that the union, as an entity separate from its members, is responsible. *North River Energy Corp.*, 664 F.2d at 1192. Moreover, sec. 103.54, Stats., does not allow presumptions to be used in determining union participation. Hence, the mass action theory has question-

[10] The MTEA constitution provides:

> Section 3. Duties. It shall be the duty of the Building Representative to carry out the policies of the Association, enforce the negotiated contract, post notices, conduct building elections and serve as a liaison betweeen the Representative Assembly and the group he/she is representing.

> able applicability to sec. 103.54 liability. In addition, the MTEA members who walked out at Pulaski High School comprise less than two percent of MTEA's membership. This was hardly a "mass action."

There is no federal case law which holds that if there is a low percentage of strikers to the total membership, then participation ceases to be a question of fact for the jury. If that were the case, as long as a union did not have more than 50% of its members involved in a job action, be it a wildcat strike, a slowdown or other prohibited activity, there would be no liability for participation in an illegal strike. The appellant believes that such an unreasonable precedent would allow illegal strikes as an everyday occurrence for which there would be no culpability for any injuries or harm caused the public.

Sec. 103.54 (just as 29 U.S.C. 106) addresses members' actions. No organization shall be held ". . . liable for the unlawful acts of . . . officers, *members* or agents except" upon a showing of the three grounds. The appellant submits that participation is a question of fact for a jury, especially in this instance where the union hierarchy was aware of the pending strike the night before and failed to warn anyone. This would comport with the federal precedent as articulated.

In *Danielson, supra*:

> A union is responsible for the mass action of rank and file *members* as long as it is a functioning entity. [citations omitted]. The rationale for the mass action theory has been described as follows:
>
> "When all the members of a union employed by a given employer engage in a concerted strike not formally authorized by the union, as happened here, many courts hold the union responsible on the theory that mass action by union members must realistically be regarded as union action. The premise is that

large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members." [citations omitted]

Ratification

Finally, as to the issue of ratification, the court of appeals held that ". . . the *only* benefit Sobczyk alleges is that the teachers got what they wanted—the student was not returned to class". This apparently was an oversight on the court's part, for not only did the union obtain that concession but it also crowed about its collective success in the union newspaper headline, which credited the strike to the entire union, "**MTEA** INSISTS STUDENT NOT BE RETURNED" (Tr. Vol. II. p. 469). More importantly, prior to the union members' return to work, the union by its executive staff bargained for and received from the Milwaukee School Board a "non recrimination" agreement to the effect that its members would not and could not be punished by the school board for an illegal strike which violated not only the no-strike clause of the contract but Wisconsin state law. If this type of activity is not ratification, then nothing short of a formal vote of ratification qualifies as evidence for a jury.

The court of appeals also concluded that the union could not punish for an illegal strike. Nonetheless, it did prevent punishment of the rank and file by a third party. Under the state precedents of *Gnat v. Westchester Fire Ins. Co.*, 167 Wis. 274, 277, 167 N.E. 250, 251 (1918), these facts should be properly resolved by a jury. However, the court summarily refused to follow the precedent of *Gnat*, finding it inapplicable.

Furthermore, it should be pointed out that the court's finding that the union could not punish for the illegal

strike was factually erroneous. The MTEA constitution, an exhibit introduced at trial, states:

> Section 9. Twenty-five (25) Building Representatives may accuse a Building Representative/Alternate of malfeasance by presenting a written petition to the President of the Association. . . . If the committee believes the accused should be removed from office by a majority vote, ... (R. 92-1, Ex. 2, Union Constitution).

The record is quite clear that absolutely no disciplinary action was taken against union rank and file or the Building Representative who led the strike. Clearly, the Wisconsin Supreme Court's precedent, *Cobb v. Simon*, 119 Wis. 597, 97 N.W. 276 (1903) should apply. However, the court of appeals disregarded this state precedent.

CONCLUSION

The case at bar presents a novel question of law which affects every walk of life in every state. In light of the practice of negotiated non-recrimination agreements, there is no sanction for such activity nor remedy for the harm caused. The appellant requests the Supreme Court to review the precedent so as to provide guidance for all the states in the union as to when a public employee's union can be held liable to a member of the public for damages incurred due to an illegal strike.

Respectfully submitted,

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APPENDIX A

[Dated June 16, 1983]

STATE OF WISCONSIN
CIRCUIT COURT :: MILWAUKEE COUNTY

ERWIN N. SOBCZYK,

Plaintiff,

vs. Case No. 577-324

MILWAUKEE TEACHERS
EDUCATIONAL ASSOCIATION,

Defendant.

DECISION ON MOTION FOR SUMMARY JUDGMENT

STATEMENT OF FACTS

On June 5, 1980 at approximately 8:30 A.M., members of the Pulaski High School M.T.E.A. building committee called a faculty meeting in the school's library. The reason for the meeting was to discuss the faculty's contractual rights because of a dispute between Pulaski High School members of M.T.E.A. and the Milwaukee School Board and the Pulaski High School administration. This dispute was over what action should be appropriately taken with respect to a suspended student. While this meeting was going on, classroom doors were locked and the students were left to their own devices.

This was also the date of the annual locker cleanout which was held prior to summer vacation. Garbage cans and containers were in the school hallways to facilitate the pre-vacation clean-up. Finding themselves locked out of their classrooms and largely unsupervised, the students proceeded to knock over these garbage containers and otherwise engage in "horseplay". During this period an unknown person, presumably a student, picked up and threw a metal trash can filled with garbage at the plaintiff, Erwin N. Sobczyk. At the time of the incident, Mr. Sobczyk, a long-time Pulaski High School boiler attendant, had been engaged in his duties of policing debris in the first floor foyer.

Due to the blow, Sobczyk was unable to get help and only obtained assistance some 15-20 minutes later due to the aid rendered by a student. During this 15-20 minute period teachers remained locked in the library, the police were not summoned, and Mr. Sobczyk was given no assistance by school personnel. Plaintiff contends that due to the continued instability of Sobczyk's right leg, because of the blow received on June 5, he was forced to stop working on October 10, 1980.

Defendant M.T.E.A. is asking for summary judgment based on two contentions:

1. Defendant did not authorize, participate or ratify the actions of Pulaski High School teachers on June 5, 1980 and therefore it is immune from civil liability under Wis. Stat. 103.54,

   and

2. The Defendant's action fail to meet the requirements necessary to establish a cause of action grounded in negligence.

QUESTIONS PRESENTED

I. Does Wis. Stat. 103.54, "Responsibility for Unlawful Acts," establish that a Wisconsin union is totally immune from culpability for tortious conduct?

A. Does negligence, as a cause of action, come within the parameters of an unlawful act?

B. Even if Wis. Stat. 103.54 is interpreted to establish a general rule of union immunity, are there questions of fact precluding summary judgment as to whether the Defendant union might fall within the statutory exceptions to nonliability?

II. Are there questions of fact which, if proven, could establish negligence as a viable cause of action against M.T.E.A.?

A. Did M.T.E.A. owe a duty based on the collective bargaining agreement which it negotiated between the teachers and the City of Milwaukee to control the students?

B. Were M.T.E.A.'s acts and omissions the proximate cause of Plaintiff Sobczyk's injuries?

C. Even if M.T.E.A. is negligent, are there public policy factors which, when applied, would deny M.T.E.A. liability?

DISCUSSION

I. *Does Wis. Stat. 103.54, "Responsibility for Unlawful Acts", establish that a Wisconsin union is totally immune from culpability for tortious conduct?*

It appears clear that both parties agree that the June 5, 1980 incident constituted a "labor dispute". Therefore, at least initially, Wis. Stat. 103.54 is applicable. Defendant claims that this statute establishes a general rule of non-liability subject only to the exception stated by the

statute. Conversely, Plaintiff contends that the statute ". . . does not grant total or partial immunity for union tort culpability, but rather establishes a burden of proof which a Plaintiff must meet to sustain criminal or civil liability". (Memo of Law in Opposition to Summary Judgment, p. 6. Hereinafter Plaintiff's Brief.)

Although it is undoubtedly of scholarly interest whether this statute establishes a general non-liability rule with a specific exception or the Plaintiff's burden of proof for establishing liability, it is not really a question which this court needs to address in deciding this summary judgment motion. Instead, emphasis can be placed on whether or not there are questions of fact which do establish union liability, i.e. can the Plaintiff show by a preponderance of the evidence that:

1. the acts done on June 5, 1980 were done by officer, members or agents of M.T.E.A.

   and

2. M.T.E.A. participated in, or actually authorized the acts, or knowingly ratified the acts.

At a minimum these statutory grounds which establish liability modify what initially appears to be a non-liability rule. No matter which way the statute is interpreted, the court's primary concern must be focused on the impact of this latter language.

A. *Does negligence, as a cause of action, come within the parameters of an unlawful act?*

In Plaintiff's Brief, p. 7, Plaintiff half-heartedly acknowledges the potential issue as to whether "the term 'unlawful' includes the doctrine of negligence". This question arises from the "title" of Wis. Stat. 103.54, "Responsibility for Unlawful Acts". If "unlawful" does not include

negligence, then the statute is arguably inapplicable in the first instance.

Black's Dictionary, 5th ed., defines unlawful as "That which is contrary to, prohibited, or unauthorized by law . . . While necessarily not implying the element of criminality, it is broad enough to include it". This latter phrase indicates that contrary to what many laymen may think, "unlawful" is not restricted to criminal actions. One of Black's definitions of negligence is: "Conduct which falls below the *standard established by law* for the protection of others against unreasonable risk of harm. . . ." (emphasis added). Since such conduct is measured against a standard established by law, it would at least appear to fall within the dictionary parameters "unauthorized by law". Therefore, the applicability of Wis. Stat. 103.54 to a negligence cause of action cannot reasonably or logically be rejected.

B. *Even if Wis. Stat. 103.54 is interpreted to establish a general rule of union immunity, are there questions of fact precluding summary judgment as to whether the defendant union might fall within the statutory exceptions to nonliability?*

In order for the defendant to incur liability under Wis. Stat. 103.54(a), the acts in question must have been done by persons who are officers, members or agents of the M.T.E.A. As the Plaintiff points out in its brief, p. 7, this appears to be a non-issue because in the Defendant's brief, pps. 1-2, it was stated that "the building committee (a group of union representatives, located at each of the Milwaukee Public Schools) for Pulaski High School called for all faculty members to assemble in the library. The congregation met to discuss . . . their rights under the provision of the contract. . .". This language, by the Defen-

dant, appears to concede that the "doing such acts" statutory requirement for M.T.E.A. liability is met in this case.

In addition to the "doing such acts" requirement, in order to incur liability, according to Wis. Stat. 103.54(b), it must also be found that the union participated *OR* authorized, *OR* ratified the Pulaski High School teachers' actions. Plaintiff contends that further discovery is necessary to determine if authorization was given. However, Plaintiff does contend that there was union participation because "all of the union members at Pulaski, in response to a union committee call, walked off their jobs, abandoning their contractual duties". (Plaintiff's Brief, p. 9). This appears to present a question of fact as to the extent of union participation and as to who initiated the walkout. It would appear from the facts as conceded by the parties, that the union building committee by calling the meeting did participate in the walkout within the meaning of this statute.

In contradiction, Defendant contends that Donald Ernest, M.T.E.A.'s agent or employee, told the teachers that M.T.E.A. would not approve of the walkout and worked with the school administration to resolve the situation. (Defendant's Brief, pps. 6-7). Rather than bolstering an argument in favor of summary judgment, this appears to create only more issues of fact.

It does appear that the Defendant is trying to distinguish actions taken by its rank and file from those taken by the union leadership. However, "as a general proposition, a functioning union is held responsible for the mass actions of its members. This 'rule' is not a statement of the law, but a common sense proposition of logical factual inference". *Adley Express Co. v. Highway Truck*

Driv. & H., Loc. No. 107, 349 F. Supp. 436, 443 (E.D. Pa. 1972). The Defendant, in its reply brief, p. 2, attempts to distinguish *Adley* from the case at bar because in *Adley* the secretary-treasurer and chief executive officer had recommended the union's action. This rule, however, does not appear to be so circumscribed. In addition, this distinction appears to be illusory. The statute makes no distinction as to whether the participation is by union members or its leadership. In reality what impact would union participation ever have if not for its members?

Even if it is found by this court that there was no union participation or authorization, Plaintiff contends that M.T.E.A. ratified the teachers' actions by retaining the benefits of the "unlawful strike" (whatever those benefits might be) and by not punishing its members (Plaintiff's Brief, pps. 10-11, based on *Gnat v. Westchester Fire Ins. Co.*, 167 Wis. 274 (1918) and *Cobb v. Simon*, 119 Wis. 597 (1903)). In contrast, the Defendant contends there was no ratification based on the actions of Donald Ernest, as previously discussed. Again, this difference between the parties appears to boil down to questions of fact. However, the actions of Donald Ernest really do not address the issue of ratification because they occurred simultaneously with the labor dispute. Instead, ratification involves M.T.E.A.'s actions after the dispute. This was not really addressed by the Defendant.

In summary, assuming that the "doing of acts" requirement is met, the statutory requirements of participation, authorization or ratification is phrased in the disjunctive. Whether or not any one of these latter three was done by the M.T.E.A. raises questions of fact which make summary judgment inappropriate.

II. *Are there questions of fact which, if proven, could establish negligence as a viable cause of action against M.T.E.A.?*

It appears clear that in order to establish negligence four elements must be proven:

1. existence of a duty
2. breach of the duty
3. causal connection between the conduct and the injury
4. actual damages resulting from the injury.

E.G., *Coffey v. City of Milwaukee*, 74 Wis. 2d 526, 531; 247 N.W. 2d 132 (1976). Defendant contends that M.T.E.A. was under no duty, that M.T.E.A. actions did not cause Plaintiff's injuries, and in any event, even if M.T.E.A. was negligent, liability should not be imposed for public policy reasons.

A. *Did M.T.E.A. owe a duty based on the collective bargaining agreement which it negotiated between the teachers and the City of Milwaukee to control the students?*

The basis for M.T.E.A.'s argument that it had no duty to control the student whose actions caused Plaintiff's injuries is that its relationship with the students does not fall within any of the exceptions to the rule enunciated in Restatement (Second) of Torts, Sec. 315. This section, which has been adopted in Wisconsin, establishes the general rule that in the absence of a special relationship, like that of parent-child, an individual has no duty to control the conduct of a third person.

In contrast, Plaintiff alleges such a duty arises from the collective bargaining agreement and M.T.E.A.'s failure to

keep the teachers in their classrooms according to their contract was a breach of its duty. According to the Plaintiff, by undertaking to negotiate a contract for the teachers' services, the union undertook the duty of supervising its members.

> ". . . the union herein undertook the collective responsibilities of its members and when the members all breached their duty, the union breached its duty. It would be imprudent social policy to grant associations benefits without said associations bearing the concommitant responsibilities due society."

(Plaintiff's brief, p. 12). Additionally, Plaintiff cites several cases which support the agency argument and the duty of unions to protect the public health and safety. (See Plaintiff's brief, pps. 13-14.)

Logically, it would appear that a union has a duty to supervise and control its members because otherwise any collective bargaining agreement would be rendered useless. Why would any school system sign such an agreement which, for example, provided that teachers would get one hour for lunch, if any or every teacher could individually decide to take two hours for lunch without suffering any reprimand? Therefore, as long as the actions taken by teachers fall within the parameters of the collective bargaining agreement, M.T.E.A. would appear to share the duty. This presents questions of fact precluding summary judgment.

Additionally, it is clear that "[a] teacher in the public schools is liable for injury to the pupils in his charge caused by his negligence or failure to use reasonable care". *Cirillo v. Milwaukee*, 84 Wis. 2d 705, 711 (1967), citing *Grosso v. Wittemann*, 266 Wis. 17, 20, 62 N.W. 2d 386 (1954). What the Plaintiff is really contending is that the teachers breached their duty by not supervising the students. The

teachers' breach is to be imputed to the union and/or the union is directly responsible because it failed to adequately control the teachers' actions, an obligation which it implicitly accepted by participating in the collective bargaining process. Assuming that the union has such a duty, a question of fact would exist as to the type and degree of control they attempted to exercise over their members in the situation at Pulaski High School.

B. *Were M.T.E.A.'s acts and omissions the proximate cause of Plaintiff Sobczyk's injuries?*

Defendant contends that none of M.T.E.A.'s actions were a substantial factor in causing Sobczyk's injury. Instead fault lies with ". . . either the administration, in failing to properly supervise during this assembly, or the teachers when they left their designated assignments". (Defendant's brief, p. 11). Defendant further contends that "the assembly occurred independently and not as a concerted union activity". (Defendant's brief, p. 11). This latter point obviously presents a question of fact since it has been acknowledged that the teachers' meeting was called by the building committee which is a group of union representatives. As the Plaintiff points out, causation is generally a question of fact to be left to a jury. *Webster v. Krembs*, 230 Wis. 252, 282 N.W. 564, 567 (1939). (Additional citations may be found in Plaintiff's brief pps. 16-17).

Although this court need not decide if the teachers' absence from the classrooms was a substantial factor in causing Mr. Sobczyk's injuries in ruling on this summary judgment motion, it appears clear that such a finding could be made. In *Cirillo v. Milwaukee*, 84 Wis. 2d 705 (1967) the court held that a jury could find that a teacher's failure to supervise a gym class was a cause of the injuries sustained by one of the students. The court said:

> "That a group of almost 50 adolescents left unsupervised in a gymnasium for this period of time contains within it at least the seeds of unruliness is perhaps not a proper object of judicial notice. However, the least that can be said is 'Boys will be boys'."

Id. at 713-14 quoting the dissenters in *Thompson v. Board of Education of City of New York*, 255 App. Div. 786, 6 N.Y. Supp. 2d 921, 922 (1938). A finding similar to that of *Cirillo* seems appropriate here.

C. *Even if M.T.E.A. is negligent, are there public policy factors which, when applied, would deny M.T.E.A. liability?*

The Defendant contends that even if it has been found to be negligent, liability should be precluded, as a matter of law, based on any of the following public policy reasons:

> "(1) the injury is too remote from the negligence; or (2) the injury is too fully out of proportion to the culpability of the negligent tortfeasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligence and tortfeasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point".

(Defendant's brief, p. 12, based on *Stewart v. Wulf*, 85 Wis. 2d 461, 479, 271 N.W. 2d 79 (1978); *Coffey v. Milwaukee*, 74 Wis. 2d 526, 541, 247 N.W. 2d 885 (1979)). Basically the Defendant contends that liability should not be imposed against M.T.E.A. for acts done by a third person when M.T.E.A. had no control over the third person because the imposition of such liability has no sensible or just stopping point. (Defendant's brief, p. 12)

In contrast, Plaintiff contends that to preclude liability on public policy grounds would be to immunize unlawful activity, i.e. a strike by public employees. In addition, Plaintiff contends that to permit a private damage action against a public sector union would further the goal of deterring public employee strikes. (Plaintiff's brief, p. 22).

Since neither side cites any precedent on point, this falls within this court's discretion. Although public policy tests as to recovery or damages does not always require a full factual resolution of the cause of action by trial before they will be applied, it is my opinion that this is not such a case. See *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514, 520, 219 N.W. 2d 242 (1974); *Hass v. Chicago & Northwestern Ry. Co.*, 48 Wis. 2d 321, 326-27, 179 N.W. 2d 885 (1970). Without doubt, this case involves sensitive issues, and, therefore, further discovery and knowledge of all relevant facts should be obtained before the court if it would be in the public interest to preclude liability.

CONCLUSION

It appears that Wis. Stat. 103.54 is applicable to the case at bar and that the acts or omissions in question were, at a minimum, done by M.T.E.A. members. Questions of fact exist which necessitate further discovery as to whether M.T.E.A. authorized the teachers' actions. Such similar information is needed to determine whether M.T.E.A. ratified the teachers' actions by retaining the benefits or subsequently rejected their actions by taking some punitive measures. It is a little harder to find union participation because of the apparent rejection of the teachers' acts by Donald Ernest, M.T.E.A. agent or employee. However, the role of the building committee presents a question of fact with respect to union participation. In any event, the requirements of authorization, par-

ticipation and ratification are stated in the disjunctive. If any one of them are found, M.T.E.A. would incur liability.

There appears to be no question that the teachers breached their duty to properly supervise and control the students under their charge. Arguably the teachers' negligence can be imputed to the union, just as the negligence of a corporate worker is imputed to the corporation.

> ". . . a corporation acts of necessity through its agents whose acts within the scope of the agents' authority are acts of the corporation both for the imposition of civil and criminal liability".

(Plaintiff's brief, p. 13, quoting *State v. Dried Milk Products Co-operative*, 16 Wis. 2d 357, 361, 114 N.W. 2d 412 (1961).) Alternatively, it can be argued that the union assumed direct responsibility for the teachers and their actions by negotiating their collective bargaining agreement. Whether the collective bargaining agreement in this case involves the situation involved here is a question of fact.

Once a duty is found, or at least recognition of questions of fact as to the duty, causation is generally a jury matter. Although the application of public policy tests without a full trial to preclude liability is within the court's discretion, the invitation to so decide must be declined. The sensitivity of the issues in this case and the countervailing public policy reasons for creating liability make such a course premature.

For the reasons afore-stated, the defendant's motion for summary judgment is denied.

By the Court,

/s/ WILLIAM A. JENNARO
William A. Jennaro, Circuit Judge

Dated: June 16, 1983.

APPENDIX B

[Filed November 20, 1985]

STATE OF WISCONSIN
CIRCUIT COURT : MILWAUKEE COUNTY
Branch 6

ERWIN N. SOBCZYK,

Plaintiff,

vs. Case No. 577-324

MILWAUKEE TEACHERS
EDUCATIONAL ASSOCIATION,

Defendant.

SPECIAL VERDICT

QUESTION NO. 1: Was the plaintiff, Erwin N. Sobczyk, injured on June 5, 1980, during a locker clean-out at Pulaski High School?

ANSWER: Yes

QUESTION NO. 2: Was the defendant, Milwaukee Teachers Educational Association, negligent on June 5, 1980, during a locker clean-out at Pulaski High School?

ANSWER: Yes

QUESTION NO. 3: If you have answered "yes" to Question No. 2, then answer this question: Was the negligence of the defendant, Milwaukee Teachers Educational Association, a cause of the injuries sustained by the plaintiff, Erwin N. Sobczyk, on June 5, 1980, during a locker clean-out at Pulaski High School?

ANSWER: Yes

QUESTION NO. 4: What sum of money will fairly and reasonably compensate the plaintiff, Erwin N. Sobczyk, for the following:

a) Medical Expenses to Date?

ANSWER: 1666.84 Answered by the court.

b) Pain and suffering to date?

ANSWER: 10,000.00

c) Pain and suffering in the future?

ANSWER: 15,803.10

d) Loss of wages to date?

ANSWER: 55,341.70

e) Loss of wages in the future?

ANSWER: 40,000.00

Dissenting Jurors	Question Number
/s/ ROSE M. HRENAK	#4 - C, D, E
/s/ MARK D. POVIC	#4 - D, E

Dated at MILWAUKEE, WISCONSIN, this 20th day of November, 1985.

/s/ ROSE M. HRENAK
Foreperson

APPENDIX C

DISTRICT I

(Letterhead Of)
Office of the Clerk
COURT OF APPEALS
OF WISCONSIN

Madison, August 18, 1986

To:
Michael T. Sheedy
Milwaukee, Wisconsin

George W. Greene
Anna M. Pepelnjak
Milwaukee, Wisconsin

James C. Reiher
Milwaukee, Wisconsin

Clerk of Circuit Court
(L.C. #577-324)
(Milwaukee County)

Hon. Robert W. Landry
Milwaukee County
Courthouse

You are hereby notified that the Court entered the following opinion and order:

86-0532 Erwin N. Sobczyk v. The Aetna Casualty and Surety Company, et al.

Before Moser, P.J., Wedemeyer and Sullivan, JJ.

Erwin N. Sobczyk (Sobczyk) has filed a motion for summary disposition. He requests this court to summarily reverse the judgment dismissing his complaint. He alleges that Aetna Casualty and Surety Company (Aetna) and the Milwaukee Teachers Education Association (MTEA) fail to

comply with sec. 805.16, Stats., when they served their motion for judgment notwithstanding the verdict twenty-one days after the verdict was rendered. Sobczyk asserts that this late service deprived the trial court of the jurisdiction to grant the motion. Based upon our review of the memoranda and record, we conclude that this case is appropriate for summary disposition. We reverse the trial court's judgment.

Sobczyk was injured during a student riot at the Pulaski High School when an unknown individual struck him in the leg with a trash can. The jury awarded Sobczyk $112,811 in damages. The trial court granted Aetna and MTEA's motion for judgment notwithstanding the verdict. The motion was timely filed but service by mail—which would have been complete upon mailing—was ineffective because of an error in addressing the envelope. Though the motion was not served on Sobczyk within twenty days of the verdict, the trial court granted it. The judge dismissed the complaint and taxed costs against Sobczyk. Sobczyk appealed.

The relevant facts are not in dispute. The application of a statute to a given set of facts is a question of law, *Bitters v. Milcut, Inc.*, 117 Wis. 2d 48, 49, 343 N.W.2d 418, 419 (Ct.App. 1983), which this court decides without deference to the trial court's determination. *Ball v. District No. 4, Area Board*, 117 Wis. 2d 529, 537, 345 N.W.2d 389, 394 (1984).

Sobczyk argues that compliance with the twenty day rule for filing and serving post-verdict motions in sec. 805.16, Stats., is mandatory. Sobczyk relies on *Brookhouse v. State Farm Mutual Insurance*, 130 Wis. 2d 166, 387 N.W.2d 82 (Ct.App. 1986), in which the court of appeals held that the requirement that post-verdict motions be

filed in the trial court within twenty days of the verdict was jurisdictional. *Id.* at 170-71, 387 N.W.2d at 83. *Brookhouse* also held that sec. 801.15(2)(a), Stats., which allows the enlargement of specified time periods if based upon excusable neglect, was not available to cure a late filing under sec. 805.16, Stats. *Id.* Aetna and MTEA argue that the holding in *Brookhouse* is distinguishable because they filed their motion within twenty days of the jury's verdict but only failed to serve it on Sobczyk within that period.

The distinction Aetna and MTEA assert is without legal significance. Section 805.16, Stats., requires both filing and service within twenty days of the verdict: "Time for Motions after Verdict. Motions after verdict shall be filed and served within 20 days after the verdict is rendered. . . ." This language is clear an unambiguous. We conclude that the late service of the post-verdict motion on Sobczyk deprived the trial court of the authority to grant it.

Alternatively, Aetna and MTEA argue that its late filing should be excused under sec. 805.18(1), Stats. That statute permits the trial court to disregard errors or defects in the proceedings which do not affect the substantial rights of an adverse party. The practical effect of this argument is to enlarge the time for service of the post-verdict motion. This position was directly struck down in *Brookhouse. Id.* at 169-71, 387 N.W.2d at 83-84.

Finally, Sobczyk argues that this court could review the appeal under sec. 752.35, Stats. *See Jos. P. Jansen Company, Inc. v. Milwaukee Area District Board of Vocational, Technical & Adult Education,* 105 Wis. 2d 1, 10, 312 N.W.2d 813, 817 (1981). Such review requires an evaluation of the merits of the appeal. However, the court need not address this contention since application of sec.

805.16, Stats., and *Brookhouse, supra,* is dispositive of the appeal. *Gross v. Hoffman,* 227 Wis. 296, 300, 277 N.W. 663, 665 (1938).

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the trial court is summarily reversed pursuant to Rule 809.21, Stats., and the court is directed to enter judgment on the verdict.

Marilyn L. Graves
Clerk of Court of Appeals

C-5

[DATED JUNE 12, 1987]

No. 86-0532

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

ERWIN N. SOBCZYK,

Plaintiff-Appellant
and Cross-Respondent,

v.

THE AETNA CASUALTY AND SURETY COMPANY and MILWAUKEE TEACHERS EDUCATION ASSOCIATION,

Defendants-Respondents
and Cross-Appellants.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee county: ROBERT W. LANDRY, Judge. *Reversed and remanded with directions.*

Before Moser, P.J., Wedemeyer and Sullivan, JJ.

PER CURIAM. Erwin N. Sobczyk appeals a judgment holding that, notwithstanding the verdict, the Milwaukee Teachers Education Association (MTEA) and its insurer are not liable to him for an injury he sustained during a disturbance at Pulaski High School. MTEA raises several issues on cross-appeal, one of which we find dispositive. We conclude that summary judgment should have been granted to MTEA following its motion to reconsider. Accordingly, we reverse the judgment and remand the matter, directing the trial court to enter summary judgment in favor of MTEA and its insurer.

Sobczyk, a custodian at Pulaski High School, was injured by a trash can thrown by an unknown student on June 5, 1980. On the previous evening, the Milwaukee Board of School Directors had failed to act, due to the lack of a quorum, on the school's recommendation that a violent student be expelled. Consequently, the board ordered the student to return to school the next morning. Several Pulaski teachers became upset, fearing for their safety. Donald Ernest, assistant executive director of the MTEA, heard rumors of a possible wildcat strike by Pulaski teachers.

On June 5, prior to the start of classes, a meeting was held by several teachers comprising Pulaski's building committee and building representative. Ernest attended the meeting and urged the teachers not to strike or walk-off, reminding them that MTEA's contract with the board had a no-strike clause.

Ernest then met with Pulaski's principal, Carl Thom, and the building representative, Robert Buege, to resolve the problem of the returning student. It was agreed that the student would be kept in another building under supervision. During this meeting, someone other than Ernest, Thom, or Buege announced over the school's P.A. system that all teachers were to lock their classrooms and report to the library.

Ernest went to the library and told the teachers that the disruptive student would not be attending classes, and he urged them to return to their classrooms. They complied. The first class period had already begun. The meeting in the library had lasted about twenty minutes.

During that time the students, locked out of their first-period classes, became unruly. Large trash cans had been placed in the halls for the annual locker clean-out, and

a student threw or pushed one of the cans, causing injury to Sobczyk's knee. Sobczyk sued MTEA and its insurer, claiming that the library meeting was a wildcat strike by MTEA's Pulaski members and that it was the cause of his injury.

MTEA brought a motion for summary judgment, claiming that sec. 103.54, Stats., precluded its liability. The trial court denied the motion and, after judicial rotation, refused to reconsider. Trial proceeded to a jury, which found MTEA liable. The trial court, however, granted MTEA's postverdict motion for judgment notwithstanding the verdict. Sobczyk appeals, asserting that he proved MTEA's liability under sec. 103.54 and that the trial court lost jurisdiction to enter a judgment notwithstanding the verdict due to MTEA's failure to timely serve him with its postverdict motion. MTEA cross-appeals asserting, *inter alia*, that summary judgment should have been granted in its favor.

We first address Sobczyk's jurisdictional challenge to the judgment. MTEA's postverdict motion for judgment notwithstanding the verdict was timely filed but Sobczyk was not served until the twenty-first day. Service by mail was ineffective due to an error in addressing the envelope. Nevertheless, the trial court granted the motion.

Section 805.16, Stats., states that "[m]otions after verdict shall be filed and served within 20 days after the verdict is rendered." The application of this statute to the undisputed facts above is a question of law. *Bitters v. Milcut, Inc.*, 117 Wis. 2d 48, 49, 343 N.W.2d 418, 419 (Ct. App. 1983). We therefore do not defer to the trial court's determination that the untimely service was insignificant. The requirement that postverdict motions be filed within twenty days is jurisdictional, and this time period may

not be enlarged due to excusable neglect. *Brookhouse v. State Farm Mut. Auto. Ins. Co.*, 130 Wis. 2d 166, 170-71, 387 N.W.2d 82, 84 (Ct. App. 1986). Because sec. 805.16, Stats., requires both filing and service within twenty days, the *Brookhouse* rationale applies to late service as well. MTEA's failure to timely serve its motion on Sobczyk deprived the trial court of the authority to grant it.

The trial court, therefore, had no jurisdiction to enter the judgment notwithstanding the verdict. MTEA argues, however, that the trial court still had jurisdiction to address MTEA's earlier motions to dismiss, which the trial court had taken under advisement. We need not decide whether the trial court retained jurisdiction over these earlier motions or whether, in fact, it granted any of them. Rather, we hold that judgment should have been entered in favor of MTEA and its insurer on their renewed motion for summary judgment.

We apply the same standard on summary judgment as the trial court does: summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Messner v. Briggs & Stratton Corp.*, 120 Wis. 2d 127, 131, 353 N.W.2d 363, 365 (Ct. App. 1984). Once a defendant has shown a prima facie case for summary judgment, the burden shifts to the plaintiff to produce evidentiary proofs creating material issues of fact. *Spitz v. Continental Casualty Co.*, 40 Wis. 2d 439, 444-45, 162 N.W.2d 1, 3-4 (1968).

Section 103.54, Stats., states that

> no association or organization participating or interested in a labor dispute . . . shall be held responsible or liable in any civil action . . . for the unlawful

> acts of individual officers, members, or agents, except upon proof by a preponderance of the evidence and without the aid of any presumptions of law or fact, both of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and (b) *actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization.* [Emphasis added.]

Section 103.54 is based on sec. 6 of the Norris-LaGuardia Act, 29 U.S.C. sec. 106 (1982). The only differences are that the federal law requires proof by clear and convincing evidence rather than by a preponderance, and the state law does not allow presumptions. A union's liability based on its authorization, participation, or ratification of members' illegal acts may also arise under sec. 301 of the Labor Management Relations (Taft-Hartley) Act of 1947, as amended, 29 U.S.C. sec. 185 (1982). Under that statute, general agency principles apply. Because sec. 103.54 is partially patterned after these federal statutes, federal case law is presuasive. *See State v. Wickstrom*, 134 Wis. 2d 158. 162, 396 N.W.2d 188, 190 (1986).

MTEA concedes that it was "interested in a labor dispute" and that the library meeting was an act by its members. We assume for this analysis, that the acts of the Pulaski MTEA members were "unlawful acts" under sec. 103.54, as either negligence or an illegal strike. The parties do not dispute the historical facts but only their legal effect. Thus, our only question is whether the acts of Ernest or the Pulaski teachers on June 5, 1980, or any subsequent conduct of the union, amounted to the union's actual authorization of, actual participation in, or ratification of the teachers' walk-off. We will consider evidentiary materials submitted pursuant to MTEA's original motion for summary judgment and those submitted pur-

suant to its motion for reconsideration and renewed motion for summary judgment.

Sobczyk asserts that the union authorized the strike because it was called by the building committee. Documents and affidavits submitted by MTEA, however, establish that the building committee has no authority to call a strike and that Ernest, in his capacity as assistant executive director of MTEA, informed the teachers that a strike would be illegal and urged them to return to work. Sobczyk has not shown a material issue of fact regarding authorization, therefore we conclude, as a matter of law, the June 5th actions of Ernest and the building committee members do not amount to union authorization. *See also North River Energy Corp. v. UMW*, 664 F.2d 1184, 1192 (11th Cir. 1982) (fact that all union committeemen and officials failed to work during illegal strike "cannot be construed as participation and authorization by the union").

Sobczyk bases his assertion that the union participated in the strike on the facts that (1) all MTEA members at Pulaski participated (the mass action theory) and (2) Ernest, as a union executive, negotiated an end to the strike. We hold that these facts, as a matter of law, do not amount to union participation.

The mass action theory, that a union is responsible for the mass actions of its members, is based on the supposition that vast numbers of people do not act without leadership. It is not "a per se rule that a union is liable any time its members go on strike." *United States Steel Corp. v. UMW*, 519 F.2d 1249, 1253 (5th Cir. 1975) *reh'g denied*, 526 F.2d 337 (1976). A union has an identity separate and apart from its members, *Consolidation Coal Co. v. UMW*, 500 F. Supp. 72, 74 (D. Utah 1980), *aff'd*, 725 F.2d 1258 (6th Cir. 1984), and the fact that a strike occurred is not sufficient in itself to raise a presumption that the union,

as an entity separate from its members, is responsible. *North River Energy Corp.*, 664 F.2d at 1192. Moreover, sec. 103.54, Stats., does not allow presumptions to be used in determining union participation. Hence, the mass action theory has questionable applicability to sec. 103.54 liability. In addition, the MTEA members who walked out at Pulaski High School comprise less than two percent of MTEA's membership. This was hardly a "mass action."

Nor do Ernest's actions amount to union participation in the illegal action. Rather, Ernest's actions were directed towards first preventing and then ending the strike. In similar cases, unions have been held not liable. *E.g.*, *United States Steel Corp.*, 519 F.2d at 1253 ("Clearly, a union is not responsible for an unauthorized strike which the union officials are endeavoring to stop."); *Consolidation Coal Co.*, 500 F. Supp. at 75 (union official told members that strike was illegal and violated contract, and advised them to return to work). In *UMW v. Gibbs*, 383 U.S. 715 (1966), a union representative went to the scene of a violent but otherwise legal strike, took control of the situation, and stopped the violence. In holding the union not liable, the Court was persuaded "that the [union] did what it could to stop or curtail the violence." *Id.* at 739. We conclude that Ernest's actions in trying to avert or end the strike are not union participation rendering the union liable under sec. 103.54, Stats.

Finally, Sobczyk asserts that the union ratified the illegal action by either retaining the benefits of the strike or not disciplining the members who struck. Neither factor is persuasive.

For his first proposition, Sobczyk cites *Gnat v. Westchester Fire Ins. Co.*, 167 Wis. 274, 277, 167 N.W.2d 250, 251 (1918), which states that retaining the benefits of an unauthorized contract, but repudiating its responsibilities,

creates ratification of the unauthorized contract and, hence, liability. The only benefit Sobczyk alleges is that the teachers got what they wanted: the student was not returned to class. For his second proposition, Sobczyk cites *Cobb v. Simon*, 119 Wis. 597, 606, 97 N.W. 276, 279 (1903), which states that retention of a servant in his employment after notice to the employer of the servant's tort is evidence of ratification. Under MTEA's constitution and bylaws, however, there is no provision allowing the union to discipline members for an illegal strike. Sobczyk has not shown a material issue of fact regarding the union's ability to discipline its members. Nor is he entitled to judgment as a matter of law.

In *Falls Stamping & Welding Co. v. UAW*, 744 F.2d 521, 527 (6th Cir. 1984), the court rejected the company's argument that by negotiating with the company, the union was ratifying the strike and seeking to gain a benefit from the violation of the collective bargaining agreement. *See also United Steelworkers of America v. Lorain*, 616 F.2d 919, 922-23 (6th Cir. 1980), *cert. denied*, 451 U.S. 985 (1981) (union's attempts to discuss grievances with employer do not constitute ratification). Moreover, a union is not required to impose sanctions on members striking in violation of a collective bargaining agreement, and the union may meet with the employer to resolve grievances in order to expedite a return to work. *Falls Stamping & Welding Co.*, 744 F.2d at 526; *United Steelworkers*, 616 F.2d at 923 (union's failure to discipline strikers, when discipline was not legally available to it, was not ratification). Thus, the actions of Ernest and the Pulaski MTEA members do not, as a matter of law, constitute ratification.

By the Court.—Judgment reversed and cause remanded with directions to enter a summary judgment dismissing the complaint on its merits.

Not recommended for publication in the official reports.

APPENDIX D

(Letterhead Of)
Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Hon. Robert W. Landry
Milwaukee County Circuit Court
901 N. 9th St., Rm. 513
Milwaukee, WI 53233

Madison, August 18, 1987

To:
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Dorothy H. Dey
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310 W. Wisconsin Ave., #1000
Milwaukee, WI 53203

The Court today announced an order in your case as follows:

No. 86-0532 *Sobczyk v. The Aetna Casualty and Surety Company, et al.* T.C.#577324

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of plaintiff-appellant and cross-respondent-petitioner Erwin N. Sobczyk, and a petition for cross-review by defendants-respondents and cross-

appellants-cross petitioners The Aetna Casualty and Surety Co., and Milwaukee Teachers Education Association, and an objection to the response which has been treated as a motion to strike that document, and considered by the court,

IT IS ORDERED that the motion is denied, with no costs;

IT IS FURTHER ORDERED that the petitions for review and cross-review are denied, with no costs.

Heffernan, C.J., and Day, J., did not participate.

Marilyn L. Graves
Clerk of Supreme Court

Supreme Court, U.S.
FILED
NOV. 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-641

In The
Supreme Court of the United States
October Term, 1987

ERWIN N. SOBCZYK,
Petitioner,

v.

THE AETNA CASUALTY AND SURETY COMPANY and MILWAUKEE TEACHERS EDUCATION ASSOCIATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals of Wisconsin correctly held that the trial court erred in denying respondents' renewed motion for summary judgment for dismissal of the complaint based upon § 103.54, Wis. Stat., preclusion of liability against the respondents where it was undisputed that the MTEA did not authorize, participate in or ratify its members' acts?

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WISCONSIN STATUTE INVOLVED

103.54 Responsibility for unlawful acts.

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute (as these terms are defined in s. 103.62) shall be held responsible or liable in any civil action at law or suit in equity, or in any criminal prosecution, for the unlawful acts of individual officers, members, or agents, except upon proof by a preponderance of the evidence and without the aid of any presumptions of law or fact, both of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and (b) actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization.

———o———

STATEMENT OF LACK OF GROUNDS FOR JURISDICTION

Sobczyk asserts jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). To invoke this Court's jurisdiction under this section, Sobczyk must have specially set up or claimed under the Constitution or statutes of the United States the right which he now seeks to have this Court enforce. 28 U.S.C. § 1257(3). *Webb v. Webb,* 451 U.S. 493, 495 (1981).

Further, this Court's Rule 21.1(h) mandates that Sobczyk specifically set forth in his petition "the stage in the proceedings, both in the court of first instance and in the

appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court."

Sobczyk has simply failed to establish that he ever raised a federal question in any Wisconsin court or that the Court of Appeals of Wisconsin expressly passed upon a federal question. Sobczyk's failure to set forth the procedural prerequisites to invoking this Court's jurisdiction is not surprising since he did not present any federal question to the state courts, which addressed only the applicability and interpretation of a state statute to a basically undisputed factual situation. The issue presented to the Wisconsin courts involved solely state tort liability. Therefore respondents seek damages under Rule 49.2 because the petition is frivolous.

A review of the decision of the Court of Appeals of Wisconsin reveals that the court did not even implicitly, let alone explicitly, pass upon any federal question. Therefore, this Court "will [assume] that the omission was due to want of proper presentation in the state courts," unless Sobczyk could have affirmatively shown the contrary. *Street v. New York*, 394 U.S. 576, 582 (1969), quoted with approval in *Webb*, 451 U.S. 495-96. "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that *the federal question* was adequately presented in the state system." *Webb*, 451 U.S. 496-97 [citations omitted; emphasis supplied]. *See also Board of Directors of Rotary Internat'l v. Rotary Club of Duarte*, 481 U.S. —, 95 L.Ed. 2d 474, 487 (1987).

Sobczyk never states in his petition the federal question raised in the state courts. This case revolved around the interpretation and applicability of § 103.54, Wis. Stat. Although this state statute was held to have been based in part upon 29 U.S.C. § 106 (1982), the court noted that the state statute differed in the requisite burden of proof and in the prohibition of the use of presumptions. *Sobczyk v. Aetna Cas. & Sur. Co.*, No. 86-0532 slip op. at 5 (Wis. Ct. App. June 12, 1987). The court further held that federal case law was persuasive, not controlling, in its interpretation of the state statute. The interpretation of this statute is obviously a matter of state law.

This court has succinctly set forth its rationale for strictly adhering to the requirement that the federal question sought to be raised in this Court first be properly presented to the state courts.

> [T]here are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.
>
> In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly pri-

vate, construing and applying the applicable federal requirements. As the Court has elsewhere observed, this principle of comity requires

> "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

Webb, 451 U.S. at 499-500. This procedure also permits the parties to properly develop the record and to identify independent, adequate state grounds. *Id.* at 500.

For this Court to invoke its jurisdiction pursuant to 28 U.S.C. § 1257(3), it must be clear that the petitioner presented his claim under a *federal statute* or the *federal Constitution* in the state courts, which were advised of the federal claim "at the time and in the manner required by state law." *Webb*, 451 U.S. at 501.

Aetna and MTEA respectfully submit that Sobczyk failed to present any federal question in the state trial or appellate court proceedings. The Court of Appeals of Wisconsin did not decide a federal question. Therefore, this Court is without jurisdiction in this case. The respondents request that this Court deny the petition.

———o———

STATEMENT OF THE CASE

A. Nature Of The Case

Erwin N. Sobczyk (Sobczyk) sued Milwaukee Teachers Education Association (MTEA) and its insurer, Aetna Casualty and Surety Company (Aetna), for injuries he sustained on June 5, 1980, at Pulaski High School. MTEA moved the trial court for summary judgment pursuant to §§ 103.54 and 802.08, Wis. Stat. The trial court denied the motion but invited reconsideration. The motion was renewed after judicial rotation, but the trial court refused to reconsider the motion. The matter proceeded to trial on November 11, 1985. During the trial, the court ruled that Sobczyk had failed to establish that MTEA ratified the acts of the Pulaski faculty. Therefore, the court instructed the jury that ratification was not an issue (R.103:944).

MTEA moved for a directed verdict at the close of Sobczyk's case and for dismissal at the close of all evidence, based upon statutory immunity pursuant to § 103.54, Wis. Stat. (R.102:823-36; 103:934-35). Both motions were taken under advisement and the matter was submitted to the jury, which returned a verdict on November 20, 1985, in favor of Sobczyk in the amount of $122,811.84. Motions after verdict were filed with the court on December 9, 1985. The trial court on January 13, 1986, granted both the motions after verdict and the motions taken under advisement (R.82).

Sobczyk appealed from the judgment dismissing the complaint. The Court of Appeals of Wisconsin (District I) released its decision on June 12, 1987, holding that the

trial court erred in refusing to grant the renewed motion for summary judgment. *Sobczyk,* slip op. at 4-5. The court also held that the failure of the defendants to serve their motions after verdict within twenty days was jurisdictional and deprived the trial court of the authority to decide those motions. The court did not reach other issues raised by the appeal and cross-appeal. Sobczyk filed a petition for review on July 10, 1987 with the Wisconsin Supreme Court. MTEA and Aetna petitioned for cross-review. Both petitions were denied on August 18, 1987.

B. Statement Of Facts

On May 12, 1980, a Pulaski teacher was violently attacked by a student when the teacher came to the aid of another student who was being beaten. When the assaulting student was brought to the administrative office, he loudly declared, "I'll get back and get you all" (R.102: 600-707). The student was temporarily suspended (R.100: 425). The administration agreed it was necessary to permanently expel him (R.102:711), for which school board action was necessary (R.99:185-86).

The action was on the board's agenda for a meeting on June 4, 1980 (R.99:188), but the quorum was destroyed before the matter was reached (R.102:712-13). The student, therefore, was to return to school on June 5, 1980. Pulaski faculty members at the board meeting were upset by this turn of events and considered this student a threat to their physical safety (R.100:424-25; 102:728, 754).

Early on June 5, 1980, an MTEA assistant director, who had learned of the faculty's dissatisfaction, called the

central office and suggested that the student be detained there (R.103:869-70). Also MTEA sent Ernest, an asistant executive director, to handle the Pulaski situation (R.100:492).

Buege, a teacher and chairman of Pulaski building representatives, learned during the evening of June 4, 1980, from calls from other teachers of the board's failure to act (R.100:422, 429). When he arrived at school on June 5, 1980, he was asked to meet informally in a room with various faculty members (not just building representatives or building committee members) (R.100:444, 449; 102:796). Ernest joined the meeting (R.100:496, 498).

Ernest advised against a walk-out or work stoppage. He went with Buege to the principal's office to discuss what could be done with the student. They contacted an administrative specialist for the public schools and discussed removing the student from Pulaski (R.99:253-54). Ernest suggested this solution (R.100:504; 102:798-99).

Buege returned to the room where other faculty members were and, together with those other faculty members, decided to convene a meeting of the entire staff. One of the teachers was asked to make a public address announcement asking the teachers to lock their doors and go to the library for a meeting (R.99:56-60).

Buege and the principal addressed the group. Ernest told the teachers that the student would be kept in the principal's office until he could be taken to the central office (R.100:513). The faculty then returned to their assignments (R.102:737). The meeting lasted about twenty minutes (R.100:513). No disciplinary actions were taken against any faculty member (R.100:368-69).

June 5, 1980 was locker clean-out day at Pulaski (R.100:308). Various sized trash cans were placed in the hallways by the custodial staff. While the meeting in the library was taking place, custodians had been assigned by their supervisor to watch for fires in the corridor. They were told not to pick up debris and to just stay out of the way (R.102:814, 821).

Contrary to these instructions, Sobczyk, a member of the custodial staff, was picking up debris in a first floor hallway when he was hit by a trash can thrown by an unknown person (R.101:572-73). He was injured and ultimately retired in November, 1981 (R.103:903-04, 909; 101: 580, 603; 103:882; 99:109-26; 101:615). The facts surrounding Sobczyk's injuries are irrelevant to the issue raised in this petition.

Sobczyk sued MTEA, alleging the Pulaski teachers' library meeting was a wildcat strike, causal of his injuries, for which MTEA was liable. MTEA moved the court for summary judgment, asserting that § 103.54, Wis. Stat., precluded liability. The court denied the motion, but invited reconsideration. After judicial rotation, the new judge refused to reconsider the motion (R.8; 33; 41).

Each school in the Milwaukee Public School System has a building committee made up of a group of teachers. This committee is neither founded upon nor created by the MTEA Constitution. It deals only with local matters, and its members (who need not be union members) have no power or authority (R.92:21).

Additionally, each school elects representatives to an assembly on a per capita basis. These representatives attend monthly meetings to vote on policy matters, are

charged with the responsibility of carrying out contract provisions and are not union officials. They otherwise have no constitutionally-conferred power or authority (R.92:Ex. 2 at 19-20; 99:198; 100:396; 103:850).

The union hierarchy consists of officers (elected by members) and paid staff (R.92: Ex. 2 at 1). These union officers, together with officers of other represented groups (substitute and student teachers, teacher aides, accountants, retirees), sit on the MTEA executive board, which is responsible for discussing issues of concern to members (R.92: Ex. 2 at 16-17; 102: 776). The paid union staff consists of the executive director, several assistant directors and field staff representatives (R.92: Ex. 27; 101:448). The paid union staff handle daily affairs and carry out policies set by the board and representative assembly (R. 92: Ex. 2 at 28).

MTEA represents 7,500 to 8,000 teachers (R.102:797), of which there were less than 120 at Pulaski on June 5, 1980. The Pulaski faculty can neither negotiate for nor bind the union (R.92: Ex. 1 at 1-3; 103:857).

The MTEA contract in effect on June 5, 1980, provided that teachers should not be required to be subject to "clear and imminent danger" (R.102:789), which language directly relates to people threatening teachers (R. 102:790; 103:846). It also included a "no strike" provision (R.92: Ex. 1 at 131). MTEA's policy was that teachers should "teach and grieve," airing their concerns through existing grievance procedures (R.100:460, 514). Finally, the MTEA Constitution required strike authorization by written secret ballot on a majority vote of the members (R.92: Ex. 2 at 27).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT ERRED IN REFUSING TO GRANT MTEA'S RENEWED MOTION FOR SUMMARY JUDGMENT.

On appeal the court applies the same standard on summary judgment as does the trial court pursuant to § 802.08, Stats. Summary judgment is appropriate where the pleadings and other discovery in the record, together with any affidavits filed, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Messner v. Briggs & Stratton Corp.*, 120 Wis. 2d 127, 131, 353 N.W.2d 363, 365 (Ct. App. 1984). Once the movant has established a prima facie case for summary judgment, the burden shifts to the opposing party to produce *evidentiary* proof that creates material issues of fact. The opposing party may not rely on mere allegations or denials in the pleadings. *Spitz v. Continental Cas. Co.*, 40 Wis. 2d 439, 444-45, 162 N.W.2d 1, 3-4 (1968).

MTEA relied upon § 103.54, Wis. Stat., which provides that:

> no association or organization participating or interested in a labor dispute . . . shall be held responsible or liable in any civil action . . . for the unlawful acts of individual officers, members, or agents, except upon proof by a preponderance of the evidence and without the aid of any presumptions of law or fact, both of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and (b) *actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization.*

[Emphasis added.] This statute is based on § 6 of the Norris-LaGuardia Act. 29 U.S.C. § 106 (1982). The differences involve the burden of proof required (federal is clear and convincing) and the state prohibition on the use of presumptions.

A union's liability for authorization, participation or ratification of its members' illegal acts may arise also under § 301 of the Labor Management Relations (Taft-Hartley) Act of 1947, as amended. 29 U.S.C. § 185 (1982). Under that statute, general agency principles apply.

Section 103.54, Wis. Stat., is patterned *in part* after these federal statutes. Therefore, federal case law is persuasive, but not controlling. *State v. Wickstrom,* 134 Wis. 2d 158, 162, 396 N.W.2d 188, 190 (1986).

For purposes of the issue presented as a matter of law on the motion for summary judgment, the Pulaski MTEA members' acts were assumed to be unlawful under § 103.54, Wis. Stat. Only the state statute was invoked. Sobczyk never argued that this statute violated any federal constitutional rights or that it was repugnant to any federal statute or constitutional provision. Sobczyk argued to the Wisconsin appellate courts that he had established the union's liability pursuant to this state statute. Having failed to persuade those courts he has now changed strategies.

The underlying or historical facts of June 5, 1980, were not materially disputed by the parties in this regard. It is the legal effect of those acts which was disputed.

The focus of the court of appeals, and one which MTEA believes is correct, is whether the acts of Ernest

or the Pulaski faculty on June 5, 1980, or any subsequent conduct of the union constituted actual authorization by the union of the illegal acts, actual participation by the union in the illegal acts, or ratification of the illegal acts by the union. The facts discussed below are those from MTEA's original and renewed motion for summary judgment.

A. The Union Did Not Authorize The Illegal Acts.

Sobczyk argued pursuant to § 103.54, Wis. Stat., that the union had authorized the strike because the strike was called by the building committee. The documents submitted by MTEA establish unequivocally that the building committee had no authority to call a strike. Furthermore, Ernest, as an assistant executive director of MTEA, told the teachers that the strike would be illegal and urged them to return to work. Sobczyk failed to submit any evidentiary proof that would raise an issue of fact regarding MTEA's authorization. Therefore, the court of appeals correctly held that Ernest's acts of June 5, 1980, as well as those of the building committee, did not amount to union authorization. *See North River Energy Corp. v. United Mine Workers,* 664 F.2d 1184 (11th Cir. 1982) (mere fact that all union committee persons and officials failed to work during an illegal strike could not be construed as union participation and authorization).

B. The Union Did Not Participate In The Illegal Acts.

Sobczyk argued that pursuant to § 103.54, Wis. Stat., the union participated in the strike because (1) all MTEA members at Pulaski participated in the strike and (2)

Ernest, a union executive, negotiated an end to the strike. The first ground is frequently called the mass action theory. The court of appeals correctly held that these facts do not amount to union participation.

Sobczyk relied on *Danielson v. United States Seafood Workers,* 405 F. Supp. 396, 401 (S.D.N.Y. 1975), for the proposition that mass action binds the union because "large groups of men do not act collectively without leadership." The court in *North River,* 654 F.2d at 1194, however, held that if the evidence "is equally susceptible of interpretation that the individual union members were engaged in an adventure of their own," then the mass action theory does not support union liability. That a strike occurred is insufficient in itself to raise a presumption that the union, as an entity separate from its members, is responsible. *Id.* at 1192.

In this case, the applicable statute, § 103.54, Wis. Stat., does not permit presumptions of fact or law. Further, the total number of teachers who walked out was less than 1.6% of the union membership (120 of 7,500 to 8,000). Obviously this was not mass action, but rather an isolated adventure for which the union is not responsible.

Under no view of the facts could Ernest's acts be viewed as union participation in the illegal walk-out. His actions were directed toward first preventing the walk-out and then toward ending the illegal walk-out. A union is not liable for an unauthorized strike which its officials are trying to stop. *United States Steel Corp. v. United Mine Workers of America,* 519 F.2d 1236, 1253 (5th Cir. 1975). The court in *Consolidated Coal Co. v. United Mine Workers,* 500 F. Supp. 72, 75 (D. Utah 1980), held that

"if the union members, on their own, choose to violate the agreement, despite the earnest and bona fide supplication of union officials," the union is not responsible.

Further, in *United Mine Workers v. Gibb,* 383 U.S. 715 (1966), as noted by the court of appeals, this Court held a union not liable in a situation where a union representative went to the scene of a violent, but legal, strike, took control of the situation and stopped the violence. This Court reasoned that the union "did what it could to stop or curtail the violence." *Id.* at 739. Ernest's actions in attempting to avert or stop the strike do not constitute union participation to make the union liable pursuant to § 103.54, Wis. Stat.

C. The Union Did Not Ratify The Illegal Acts.

Finally, Sobczyk argues that pursuant to § 103.54, Wis. Stat., the union ratified the strike by retaining benefits of the strike (i.e. the student was removed from the school) or by not disciplining the members who walked out. The court of appeals found neither of these factors persuasive on the issue of union ratification.

Sobczyk relied upon *Gnat v. Westchester Fire Insurance Co.*, 167 Wis. 274, 277, 167 N.W. 250, 251 (1918), for the proposition that retention of benefits of an unauthorized contract while repudiating the responsibilities constitutes ratification of the unauthorized contract. As noted, the only benefit Sobczyk asserts the union got was that the teachers were successful in getting the unruly, dangerous student out of the school. Moveover, Sobczyk's reference (Petitioner's Brief at 16) to union newspaper headlines and a non recrimination agreement should be

stricken because it was never admitted into evidence. Sobczyk also relied upon *Cobb v. Simon,* 119 Wis. 597, 606, 97 N.W. 176, 179 (1903), for the proposition that retention of a servant in employment after notice to the employer of the servant's tort is evidence of ratification.

What Sobczyk never has come to grips with in this argument is that there is no provision under MTEA's constitution and bylaws which would permit the union to discipline union members for an illegal strike or walk-out. Thus, Sobczyk failed to demonstrate a material issue regarding the union's ability to discipline its members.

Furthermore, the union's negotiating an end to the strike does not constitute ratification of the strike. The court in *Falls Stamping & Welding Co. v. United Automobile Workers,* 744 F.2d 521, 527 (6th Cir. 1984), rejected the assertion that the union's negotiating an end to a strike constituted a ratification of the strike and a retention of a benefit from the violation of the collective bargaining agreement. In *United Steelworkers of America v. Lorain,* 616 F.2d 919, 922-23 (6th Cir. 1980), *cert. denied,* 451 U.S. 985 (1981), the court held that the union's attempts to discuss grievances with the employer did not constitute ratification by the union.

Finally, a union is not required to sanction members illegally striking and may meet with the employer to expedite the strikers return to work. *Falls Stamping & Welding Co.,* 744 F.2d at 526; *United Steelworkers,* 616 F.2d at 923 (union's failure to sanction strikers, where sanctions not legally available to union, did not constitute union ratification). Therefore, the actions of the union

and Ernest do not constitute ratification of the illegal walk-out by the Pulaski teachers.

CONCLUSION

Based upon the foregoing reasons, the Aetna Casualty and Surety Company and Milwaukee Teachers Education Association respectfully request that this Court deny the petition for writ of certiorari and award damages pursuant to Rule 49.2.

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